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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted] 134

In the Matter of the Application

of

WALTER MARVIN, JR.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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WALTER MARVIN, JR.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

Petitioner, Walter Marvin, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the New Jersey Supreme Court, entered on January 20, 1969, affirming the decision of the Superior Court, Appellate Division, which in turn affirmed the decision of the Monmouth County Court in denying petitioner's application for a Firearms Purchaser's Identification Card.

Opinions Below

The New Jersey Supreme Court opinion is reported at 53 N.J. 147 —— A. 2d —— (1969), and is set out in the Appendix, *infra*, pp. 21-32. The Appellate Division opinion is reported at 97 N.J. Super. 62, 234 A. 2d 408, and is set out in the Appendix, *infra*, pp. 33-44. The oral opinion of the Monmouth County Court is set out in the Appendix, *infra*, pp. 45-50.

Jurisdiction

The Supreme Court of New Jersey entered judgment on January 20, 1969. On April 16, 1968, Mr. Chief Justice Warren extended the time for filing this petition to and including May 20, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

Questions Presented

1. Whether Sec. 2A:151-35 of the New Jersey Gun Control Law, which requires petitioner to state "whether he is or ever has been a member of an organization which he knows advocates the commission of acts of force or violence designed to overthrow the Government or denies others their Constitutional Rights," violates the First and Fourteenth Amendments.

2. Whether Sec. 2A:151-35 of the New Jersey Gun Control Law is vague and overbroad in violation of the due process clause of the Fourteenth Amendment.

3. Whether the New Jersey Gun Control Law violates the due process clause of the Fourteenth Amendment because it provides no standards or procedure for determining when an application is to be granted or denied.

Statutes Involved

New Jersey Statutes, 2A:151-35.

APPLICATIONS FOR PERMITS AND IDENTIFICATION CARDS; CONTENTS; BLANKS; FINGERPRINTS

Applications for permits to purchase a pistol or revolver and for firearms purchaser identification cards shall be in the form prescribed by the superintendent and shall set forth the name, residence, place of business, age, date of birth, occupation, sex, and physical description including distinguishing physical characteristics, if any, of the applicant, and shall state whether the applicant is a citizen, whether he is an alcoholic, habitual drunkard, addicted to narcotic drugs or is a habitual user of goofballs or pep pills, whether he has ever been confined or committed to a mental institution or hospital for treatment or observation of a mental or psychiatric condition on a temporary, interim or permanent basis, giving the name and location of the institution or hospital and the dates of such confinement or commitment, whether he has been attended, treated or observed by any doctor or psychiatrist or at any hospital or mental institution on an inpatient or outpatient basis for any mental or psychiatric condition giving the name and location of the doctor, psychiatrist, hospital or institution and the dates of such occurrence, whether he presently or ever has been a member of any organization, which advocates or approves the commission of acts of force and violence either to overthrow the Government of the United States or of this State, or which seeks to deny others their rights under the Constitutions of either the United States or the State of New Jersey

and whether he has ever been convicted of a crime, or disorderly persons offense, and such other information as the superintendent shall deem necessary for the proper enforcement of this chapter. The application shall be signed by the applicant and shall contain as reference the names and addresses of 2 reputable citizens personally acquainted with him.

Application blanks shall be obtainable from the superintendent and from any other officer authorized to grant such permit or identification card, and may be obtained from licensed retail dealers.

The chief police officer or the superintendent shall obtain the fingerprints of the applicant and shall have them compared with any and all records of fingerprints in the municipality and county in which the applicant resides and also the records of the State Bureau of Identification and the Federal Bureau of Investigation, provided that an applicant for a pistol or revolver purchase permit who possesses a valid firearms purchaser identification card, or who has previously obtained a pistol or revolver purchase permit from the same licensing authority for which he was previously fingerprinted, and who provides other reasonably satisfactory proof of his identity, need not be fingerprinted again; however, the chief police officer or the superintendent shall proceed to investigate the application to determine whether or not the applicant has become subject to any of the disabilities set forth in this chapter.[1]

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[1] The questions on the application form ask the following information (App., *infra*, p. 51):

"22. Are you presently or have you ever been a member of any organization which advocates or approves the commission

New Jersey Statutes, 2A:151-48.

FALSE REPRESENTATIONS IN IDENTIFICATION CARD OR PERMIT APPLICATIONS OR IN PURCHASES

Any person who gives or causes to be given any false information, or signs a fictitious name or address, in applying for a firearms purchaser identification card or a permit to purchase or a permit to carry a pistol, revolver, or other firearm, or in completing the certificate or any other instrument required by this act in purchasing or otherwise acquiring delivery of any rifle, shotgun, pistol, revolver or other firearm, is guilty of a high misdemeanor.

Statement of the Case

On August 26, 1966 petitioner applied to the Chief of Police of Middletown Township, Monmouth County, New Jersey for a Firearms Purchaser Identification Card. The application form supplied by the Chief and as completed by petitioner is set forth in the Appendix, *infra*, p. 51. Petitioner declined to answer questions 22, 23 and 24 on the

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of acts of force or violence, either to overthrow the Government of the United States or of this State, or which seeks to deny others of their rights under the Constitution of either the United States or the State of New Jersey? Yes or No.

"23. If yes to the above question what is the name of the organization.

"24. Date of membership."

The New Jersey Supreme Court in its opinion construed the question and the statute to read as follows:

"Whether he is or ever has been a member of an organization which he knows to advocate the commission of acts of force or violence designed to overthrow the Government or deny others their Constitutional Rights" (App., *infra*, pp. 21-22).

application and set forth his reasons upon the back thereof (R. 3a; App., *infra,* p. 51).[2]

On or about August 30, 1966 the petitioner received a letter dated August 29, 1966 from the Chief of Police which denied his application because the applicant had not answered questions 22, 23 and 24 (R. 1a).

At the time of the application and denial petitioner, a collector of and lecturer about guns, was the owner of approximately fifty rifles and shotguns capable of firing live ammunition (R. 5a).

Pursuant to N.J.S. 2A:151-35, petitioner appealed the denial of his application to the Monmouth County Court. At the hearing petitioner raised the question whether a portion of 2A:151-35 on its face and as applied was inconsistent with his First Amendment rights of association because the question called for by the statute was overly broad (R. 14a-18a). In addition, petitioner argued that the question was void for vagueness under the Fourteenth Amendment in that men of common intelligence could not understand the information called for by question 22 (R. 18a-20a).

The court ruled from the bench that in its opinion the statute was constitutional and affirmed the action of the Chief of Police in denying petitioner his Firearms Purchaser Identification Card (R. 27a-32a; App., *infra,* pp. 45-50).

On September 29, 1967, the Appellate Division of the Superior Court affirmed the action of the Monmouth County Court. App., *infra,* pp. 33-44.

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[2] The symbol "R" refers to the Brief and Appendix filed by petitioner as Appellant in the Appellate Division of the Superior Court of New Jersey, which contains the Record of this case. It has been certified and filed with the Clerk of the Court as the Record here.

Petitioner then appealed to the New Jersey Supreme Court. On January 20, 1969, the unanimous Court affirmed the action of the Appellate Division. App., *infra*, pp. 21-32.

The federal constitutional questions initially raised were raised again and presented at each appellate stage.

Reasons for Granting the Writ

1. The New Jersey Gun Control Law violates the First Amendment.

Pursuant to N.J.S. 2A:151-35, the application for a firearms purchaser identification card contains the following question:

> "Are you presently or have you ever been a member of any organization which advocates or approves the commission of acts of force or violence, either to overthrow the government of the United States or of this state, or which seeks to deny others of their rights under the Constitution of the United States or the State of New Jersey."[3]

As rephrased and approved by the New Jersey Supreme Court, ostensibly to meet constitutional objections, the question is now to read:

> Are you now or have you ever been a member of an organization which you know to advocate the commission of acts of force or violence designed to overthrow

[3] The application form set out in the Appendix, *infra*, p. 51, also asks for the name of the organization and dates of membership should the answer to the principal question be affirmative.

the Government or deny others their constitutional rights. App., *infra*, pp. 21-22.

The Supreme Court of New Jersey ruled that this inquiry was pertinent and rejected "the appellant's position that he was constitutionally privileged under the first amendment to refuse to answer it at all." (App., *infra*, p. 32.) In particular, the court rejected the analogy between that question as a condition precedent to licensing, and similar questions and oaths which were held unconstitutional when other individual interests were made contingent upon answer, without exception by this Court from *Cramp* v. *Board of Public Instruction*, 368 U.S. 278 (1961), through *Whitehill* v. *Elkins*, 389 U.S. 54 (1967). It said that the New Jersey Gun Control Law:

> ". . . does not require any loyalty or comparable oath on sanction of loss of employment or criminal prosecution; it does not prohibit any organizational membership or any organizational act on sanction of criminal or other penalty; and it does not provide for denial of a pistol permit or firearms purchaser identification card because of membership in any designated organization . . . The inquiry . . . merely serves as a basis for any needed further inquiry by the official who at all times has the affirmative burden of determining whether the applicant is individually qualified or disqualified under the terms of N.J.S. 2A:151-33. Cf. *Konigsberg* v. *State Bar of California*, 366 U.S. 36 (1961); In re Anastaplo, 366 U.S. 82 (1961). . . ." App., *infra*, p. 24.

The Supreme Court of New Jersey drew a distinction between "an active member of an extremist paramilitary

organization dedicated to the forceful overthrow of the Government or the forceful denial of constitutional rights" and "an inactive member of a political organization which, though ideologically favoring the forceful overthrow of democratic government, has no paramilitary or weapons-gathering aspects . . ." But the court made clear that, even in the latter case, it was "the totality of the circumstances" which would determine whether "a finding of fitness" was warranted. And that issue would only be raised after the applicant made due answer to the question contested here. App., *infra*, pp. 24-25.

The New Jersey Supreme Court relied almost entirely on *Konigsberg* v. *State Bar of California*, 366 U.S. 36 (1961), for its decision. Drawing extensively upon that portion of Mr. Justice Harlan's opinion relating to the "weighing of the respective interests involved," it concluded:

> "New Jersey's interest in preventing the gathering of firearms by groups dedicated to the forceful overthrow of the Government or the forceful denial of constitutional rights appears to exceed by far the interest of the State advanced in *Konigsberg* . . . And the intrusion on speech and association as well as the jeopardies to private interests would appear to be much lesser in nature. If, as *Konigsberg* and other Supreme Court opinions indicate, balancing is appropriate, then surely New Jersey's interest is sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosures of membership in organizations of the type inquired about here. While the Gun Control Law seeks to avoid weapons gathering by threatening

groups . . . it is in nowise aimed at penalizing political beliefs." App., *infra*, p. 27.[4]

The court below disposed of *Elfbrandt* v. *Russell*, 384 U.S. 11 (1966), by declaring that "there would be no sufficient basis for a finding of unfitness [under the New Jersey statute] if it appeared that the applicant did not share the unlawful aims of the organization and that the granting of his application would not imperil the legitimate goals of the Gun Control Law." App., *infra*, p. 30. It disposed of *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), by declaring that that case was of "little or no pertinency here." App., *infra*, p. 30.

Thus, the question here is whether the inquiry into petitioner's beliefs and association, which would otherwise be constitutionally impermissible, is constitutionally supportable because the regulation of the ownership of guns is a more compelling state interest than, for example, the loyalty of teachers in Florida [*Cramp* v. *Board of Education*, 368 U.S. 278 (1961)], Washington [*Baggett* v. *Bullitt*, 377 U.S. 360 (1964)], Arizona [*Elfbrandt* v. *Russell*, 384 U.S. 11 (1966)], New York [*Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967)], and Maryland [*Whitehill* v. *Elkins*, 389 U.S. 54 (1967)]; the protection of American shipping [*Schneider* v. *Smith*, 390 U.S. 17 (1968)]; the loyalty of elderly applicants for Medicare [*Reed* v. *Gardner*, 261 F. Supp. 87 (N.D. Cal. 1966); *Weiss* v. *Gardner*, 386 U.S. 9 (1967)]; protection of industry from political strikes [*United States* v. *Brown*, 381 U.S. 437 (1965)]; maintaining security of essential defense indus-

[4] Notably, this Court has agreed to review a new case involving inquiry by bar examiners. *Baird* v. *State Bar of Arizona*, No. 1079, cert. granted, 37 U.S.L.W. 3379 (April 17, 1969).

tries [*United States* v. *Robel,* 389 U.S. 258 (1967)]; or protection of the government against the threat of the world Communist movement [*Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964)].

In fact, the state interest in firearms control is no *more* compelling than governmental interest in, e.g., maintaining the security of essential defense facilities [See *United States* v. *Robel,* 389 U.S. 258 (1967)] or avoiding political strikes and economic disruptions [See *United States* v. *Brown,* 381 U.S. 437 (1965)]. No doubt, the state's interest in firearms control is compelling. But, "even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). In recently passing upon inquiries required pursuant to a federal loyalty-security program, Mr. Justice Douglas declared that in *Shelton* v. *Tucker,* 364 U.S. 479 (1960), "we held that an Act touching on First Amendment rights must be narrowly drawn so that the precise evil is exposed . . ." *Schneider* v. *Smith,* 390 U.S. 17, 24 (1968); see also *id.* at 27-28 (Fortas, J. concurring). And in *United States* v. *Robel,* 389 U.S. 258, 267-68 (1967), it was squarely held, with respect to an important national security interest, that:

> "Our decision today simply recognizes that, when legitimate legislative concerns are expressed in a statute which imposes a substantial burden on protected First Amendment activities, Congress must achieve its goal

> by means which have a 'less drastic' impact on the continued vitality of First Amendment freedoms."

See also *e.g.*, *Keyishian* v. *Board of Regents*, 385 U.S. 589, 609 (1967); Gunther, *Reflections on Robel: It's Not What The Court Did But The Way It Did It*, 20 STAN. L. REV. 1140 (1968); Note, *Less Drastic Means and the First Amendment*, 78 YALE L.J. 464 (1969); The New Jersey statute does not survive this test. See points 2 and 3 *infra*.

2. The New Jersey Gun Control Law is unconstitutionally broad and vague.

As pointed out above, the New Jersey Supreme Court reworded the statutory question, purportedly to save its constitutionality, so that it is to read:

> Are you now or have you ever been a member of an organization which you know to advocate the commission of acts of force or violence designed to overthrow the Government or deny others their constitutional rights.

As we point out directly below, that question itself continues to offend the vagueness and overbreadth doctrines. But the court below was not content to let the matter rest there. Presumably in an effort to further explain its statutory reinterpretation, the court went on to say:

> "... [W]e reiterate the sweep of the applicant's freedom in qualifying his responses to the inquiry. Thus he may answer negatively without more, or affirmatively as to known organizations, or by a denial of knowledge as to doubtful organizations. He may include such explanations as he considers appropriate,

> and may expressly confine his answers to present and recent memberships, pointing out that since the sole issue is his current qualification to purchase and carry weapons, his past memberships may be inquired about only to the extent that they are relevant and reasonably related to his present fitness." App., *infra*, p. 31.

An applicant is thus invited not merely to answer yes or no to the basic question, vague and overbroad as it is, but he is also invited to draw distinctions about the quality of his membership in unenumerated organizations with undefined objectives. In addition, he is encouraged to draw vague temporal conclusions regarding the relevancy today of his membership yesterday in the same specie of organization. Finally, should he accept these invitations, he may find himself prosecuted for giving the wrong answers. See Sec. 2A:151-48, *supra*, p. 5. He may not be put to such an open-ended inquisition. See *Schneider* v. *Smith*, *supra* at 27-28 (concurring opinion).

Second, the prohibited advocacy might well encompass mere "abstract" advocacy. Such advocacy, even of force or violence, may not be penalized. See, *e.g.*, *Dennis* v. *United States*, 341 U.S. 494 (1951); *Yates* v. *United States*, 354 U.S. 298 (1957). Nor can the abstract advocacy of the forceful denial to others of their constitutional rights be the basis for the denial of government benefits. See *Rockwell* v. *Morris*, 10 N.Y. 2d 721, cert. denied 368 U.S. 913 (1961); *Carroll* v. *President and Commissioners*, —— U.S. —— (1968); *Fields* v. *Fairfield*, 375 U.S. 248 (1963).[5] Furthermore, to penalize membership in organizations which

[5] Vigorous, non-abstract advocacy of illegal conduct is also protected in some circumstances. See, *e.g.*, *Kingsley International Picture Corp.* v. *Regents*, 360 U.S. 684 (1959).

advocate forceful denial to others of their constitutional rights is impermissibly vague. Given the complexities of constitutional interpretation, the average citizen is in no position to know if a given organization advocates forceful denial of such rights. *Cf. Screws* v. *United States*, 325 U.S. 91 (1945).

Third, the inquiry is unconstitutional because it permits withholding of a government benefit on the basis of but one purpose of the association, regardless of its other lawful purposes and whether or not an applicant participates only in the association's lawful activities while lending no support to any unlawful action proposed by the association. It is well established that a member of an association having lawful and unlawful purposes cannot be penalized if he confines his membership activities to the group's lawful objectives. *E.g., Elfbrandt* v. *Russell, supra*, at 17. Any rule to the contrary encourages guilt by association, which is intolerable under the First Amendment. See, *e.g., United States* v. *Robel*, 389 U.S. 258 (1967).[6]

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[6] The Court might have a different question if the scope of the inquiry were limited to disclosure of a relationship with an organization carefully described according to unlawful characteristics. *E.g.*, N.J.S. 2A:170-25.15 defines a Paramilitary Organization as:

> "... an organization which is not an agency of the United States Government or of the State of New Jersey, or which is not a private school ... [as defined by New Jersey statute], but which engages in instruction or training in guerrilla warfare or sabotage."

It is against the above narrowly drawn statute that we should read the concession, noted by the New Jersey Supreme Court, that counsel below "explicitly acknowledges that the State may properly include questions designed to ascertain whether the firearms are intended for use by extremist paramilitary or other types of organizations dedicated to the forceful overthrow of the Government or the forceful denial of constitutional rights ...", App., *infra*, p. 23.

(*footnote continued on next page*)

3. The New Jersey Gun Control Law violates the due process clause of the Fourteenth Amendment because it provides no standards or procedure for determining when an application is to be granted or denied.

N.J.S. 2A:151-33[7] sets forth the criteria for issuance of a permit. Subsections (a)-(c), none of which apply to petitioner, forbid issuance to anyone convicted of a crime, to habitual users of goofballs or pep pills, to anyone confined for a mental disorder, to habitual drunkards, and to anyone who suffers from a physical defect or sickness which would make it unsafe to handle firearms, or to anyone under 18 years old. Subsection (d), to which Question No. 22 is directed, also prohibits issuance to "any person where the issuance would not be in the interest of the public health, safety, or welfare." N.J.S. 2A:151-34 authorizes chiefs of police to issue permits "to any person qualified under the provisions of Section 2A:151-33." No other criteria are provided.

The chief of police has plenary authority to grant or deny the application on the basis of his sole judgment whether the applicant is qualified. And "he may deny where the totality of the circumstances before him discloses that the

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However, the opinion of the court below reveals that the compulsory inquiry at issue here was not so limited. The scope of the inquiry is still unclear, but unquestionably it goes beyond N.J.S. 2A:170-25.15. Even if it were limited to the definition contained in that provision, certain Fifth and First Amendment questions still might be raised. See, *e.g.*, *Marchetti* v. *United States*, 390 U.S. 39 (1968); *Garrity* v. *New Jersey*, 385 U.S. 493 (1967); *Spevak* v. *Klein*, 385 U.S. 511 (1967); *Albertson* v. *Subversive Activities Board*, 382 U.S. 70 (1965).

[7] Set out in the Appendix, *infra*, p. 53.

applicant is unfit to purchase and carry lethal weapons and that the issuance of a permit . . . would therefore 'not be in the interest of the public health, safety or welfare.'" App., *infra*, pp. 24-25. Thus under the New Jersey law, the chief of police has " . . . virtually unbridled and absolute power . . . in deciding whether or not to withhold a permit . . . guided only by [his] own ideas of . . . the public health, safety, or welfare." *Shuttlesworth* v. *City of Birmingham*, 89 S. Ct. 935, 938 (1969). The untrammeled discretion of the chief of police has been neither significantly refined nor narrowed by judicial construction. As this Court has ruled so often, " . . . a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license, without narrow, objective, and definite standards to guide the licensing authority, is unconstitutional." *Shuttlesworth* v. *City of Birmingham*, 89 S. Ct. 935, 938 (1969). The same principle applies when the regulation of speech is less direct, as through the withholding of a benefit or the imposition of a criminal sanction. See, *e.g.*, *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *United States* v. *Robel*, 389 U.S. 258, 269 (1967) (Brennan, J. concurring); *Cf. Speiser* v. *Randall*, 357 U.S. 513 (1958). The potential for discriminatory, arbitrary and capricious action is as great, and so is the resulting harm to individuals and to the First Amendment.

Moreover such indications as we have in decisions of this Court are to the effect that due process requires some type of hearing before a non-signer may be disqualified solely because he will not sign a required oath. *Cf. Speiser* v. *Randall*, 357 U.S. 513 (1958); *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). Recent decisions of this Court point the way to a guarantee of a fair hearing for

the applicant who risks the stigma of a non-signer. *Slochower* v. *Board of Higher Education*, 350 U.S. 551 (1956), is particularly apposite. There the Court refused to permit New York to draw an automatic inference of disloyalty from an employee's invocation of the Fifth Amendment privilege against self-incrimination. *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), and *Konigsberg* v. *State Bar of California*, 353 U.S. 252 (1957), extended a comparable protection to applicants for admission to the bar who were suspected of disloyalty because of their refusal to disclose certain past associations.[8]

On the basis of these precedents, a three-judge federal district court recently found Idaho's loyalty oath unconstitutional because it afforded no procedure by which the non-signer might explain his actions and vindicate his loyalty. In *Heckler* v. *Shepard*, 243 F. Supp. 841, 845 (D. Idaho 1965), the court concluded that "no discharge of a public employee, which operates to bestow a 'badge of disloyalty' or to create a 'built-in inference of guilt,' will be permitted without according to the right to such hearing as is requisite to due process of law." The vice of the Idaho statute was the automatic and arbitrary nature of the disqualification: "[T]here is no concern for employees' reasons; whether they are with or without justification; whether they are founded upon claimed constitutional guarantees. Even if a public employee holds steadfast conviction that the Federal Constitution shields him from be-

[8] In recent cases concerning control of obscenity, the Court has also stressed the importance of hearings when First Amendment rights may be jeopardized by government action. See *Freedman* v. *Maryland*, 380 U.S. 51 (1965); *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Bantam Books* v. *Sullivan*, 372 U.S. 58 (1963); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961). See also, *Stanford* v. *Texas*, 379 U.S. 506 (1965).

ing compelled to make the disclosures required, the Idaho statute affords but two alternatives: either to take the oath or to suffer summary discharge from State employment." *Id.* at 846.

The provisions in the instant case are constitutionally vulnerable on just this ground. As developed also in *Slochower,* to draw an inference of disqualification from a refusal to sign deprives the applicant of due process of law in the most basic sense. The inquiry therefore is procedurally, as well as substantively, deficient. See also, *Speiser* v. *Randall,* 357 U.S. 513 (1958); *Haskett* v. *Washington,* 294 F. Supp. 912, 918 (D.D.C. 1968) (Wright, J., concurring).

Thus, whether petitioner's application can be denied out of hand solely for refusing to answer a constitutionally dubious inquiry, is a substantial federal question which should be settled by this Court.

CONCLUSION

In view of increasing public demands for effective gun control laws which are being made across the country, the questions involved in this case will presumably arise with some frequency as other states adopt similar laws. Other states, and the federal government, are likely to pass licensing and registration statutes. There will be a tendency to delegate broad powers to local administrative officers; there will be a tendency to provide only for summary procedures; there will be a tendency to disqualify potential licensees on grounds encroaching on legitimate associational and other First Amendment freedoms. Our governmental units and citizens are entitled to know what

limits, in the interest of due process and the First Amendment, government must honor as it pursues its undoubtedly proper function of controlling use and possession of firearms. It would therefore be timely for this Court to issue a Writ of Certiorari in this early case in order to settle the important federal questions which it presents.

Respectfully submitted,

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May 19, 1969

APPENDIX

Opinion of Supreme Court of New Jersey

SUPREME COURT OF NEW JERSEY

No. A-1—September Term 1968

In re: Application of Walter Marvin, Jr.,

Appellant.

Argued October 21 and 22, 1968.

Decided January 20, 1969.

On appeal from the Appellate Division.

The opinion of the Court was delivered by Jacobs, J.

The appellant Walter Marvin, Jr. applied for a firearms purchaser identification card under N.J.S. 2A:151-35. He declined to answer several questions in the application form and thereafter he was advised that his application had been denied. He appealed unsuccessfully to the county court and the Appellate Division. *In Re Walter Marvin, Jr.*, 97 N.J. Super. 62 (App.Div. 1967). He then appealed to this Court under R.R. 1:2-1(a).

N.J.S. 2A:151-35, as soundly construed by the Appellate Division, provides that every applicant for a pistol permit or a firearms purchaser identification card shall state, *inter alia*, whether he is or ever has been a member of an organization which he knows to advocate the commission

of acts of force or violence designed to overthrow the Government or deny others their constitutional rights. Implementing the statutory provision, the application form promulgated by the Superintendent of State Police contains questions twenty-two to twenty-four inclusive which inquire into such memberships and the dates thereof. 97 N.J. Super. at 66. In his application, the appellant declined to answer the questions with the comment that they were vague and sought "to penalize membership in organizations against which there has been no judicial finding of the commission of a crime." The local chief of police denied the application because it was incomplete. In an affidavit filed in connection with the appellant's appeal to the county court, the chief of police pointed out that the omitted answers were needed for a determination as to whether further investigation was called for, and that membership in an organization of the type inquired about would not necessarily lead to a denial of the application. In its affirmance of the action by the chief of police, the county court found that the statutory requirement was "a valid exercise of the police power of the State of New Jersey and is clearly within the provisions of the United States Constitution and the Constitution of the State of New Jersey and does not infringe upon or violate any of the constitutional rights of the applicant." The Appellate Division reached the same conclusion for the reasons expressed in its reported opinion. 97 N.J. Super. 62.

The appellant does not question the State's right to regulate the purchase and carrying of firearms. *See Burton* v. *Sills,* —— N.J. —— (1968). Nor does he question the State's right to take appropriate steps towards prevention of the violent overthrow of the Government or the

violent denial of constitutional rights. Indeed, he explicitly acknowledges that the State may properly include questions designed to ascertain whether the firearms are intended for use by extremist para-military or other types of organizations dedicated to the forceful overthrow of the Government or the forceful denial of constitutional rights, but he takes the position that the questions actually set forth in the application form were vague and overbroad and in that respect ran afoul of Supreme Court cases such as *Whitehill* v. *Elkins,* 389 U.S. 54, 19 L.Ed.2d 228 (1967); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 17 L.Ed.2d 629 (1967); *Elfbrandt* v. *Russell,* 384 U.S. 11, 16 L.Ed.2d 321 (1966); *Dombrowski* v. *Pfister,* 380 U.S. 479, 14 L.Ed. 2d 22 (1965); *Aptheker* v. *Secretary of State,* 378 U.S. 500, 12 L.Ed.2d 992 (1964); and *Baggett* v. *Bullitt,* 377 U.S. 360, 12 L.Ed.2d 377 (1964). *See* Israel, "Elfbrandt v. Russell: The Demise of the Oath?," 1966 Supreme Court Review 193; Note, "Loyalty Oaths," 77 Yale L.J. 739 (1968). *See also United States* v. *Brown,* 381 U.S. 437, 14 L.Ed.2d 484 (1965); *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 7 L.Ed.2d 285 (1961), and *United States* v. *Robel,* 389 U.S. 258, 19 L.Ed.2d 508 (1967), commented upon in Gunther, "Reflections on *Robel,*" 20 Stanford L. Rev. 1140 (1968).

In dealing with the federal opinions we must bear clearly in mind, just what the pertinent statutory requirement is aimed at and precisely what it does and does not entail. It is part of New Jersey's Gun Control Law which seeks to prevent criminal and other unfit elements from acquiring lethal weapons while enabling the fit elements of society to obtain firearms with minimal burdens and inconveniences. *See Burton* v. *Sills, supra,* —— N.J. ——. It

does not require any loyalty or comparable oath on sanction of loss of employment or criminal prosecution; it does not prohibit any organizational membership or any organizational act on sanction of criminal or other penalty; and it does not provide for denial of a pistol permit or firearms purchaser identification card because of membership in any designated organization. It does, however, direct the administrative official to inquire whether the applicant is or has been a member of an organization which he knows to advocate the commission of acts of force or violence designed to overthrow the Government or deny to others their constitutional rights. The inquiry is clear and understandable and may be answered negatively, affirmatively or qualifiedly. Whatever the answer, it merely serves as a basis for any needed further inquiry by the official who at all times has the affirmative burden of determining whether the applicant is individually qualified or disqualified under the terms of N.J.S. 2A:151-33. *Cf. Konigsberg* v. *State Bar of California,* 366 U.S. 36, 6 L.Ed.2d 105 (1961); *In re Anastaplo,* 366 U.S. 82, 6 L.Ed.2d 135 (1961); *see also Borrow* v. *F.C.C.,* 285 F.2d 666 (D.C.Cir.), cert. denied, 364 U.S. 892, 5 L.Ed.2d 188 (1960); *Howite* v. *United States,* 390 F.2d 589 (3d Cir. 1968), vacated for mootness, —— U.S. ——, —— L.Ed.2d —— (1968).

In making his determination, the official is not authorized to deny an application because of organizational membership alone, although he may deny where the totality of the circumstances before him discloses that the applicant is unfit to purchase and carry lethal weapons and that the issuance of a permit or identification card to him would therefore "not be in the interest of the public health,

safety or welfare." N.J.S. 2A:151-33(d). *See Burton* v. *Sills, supra,* —— N.J. ——. Where the applicant is an active member of an extremist paramilitary organization dedicated to the forceful overthrow of the Government or the forceful denial of constitutional rights, the totality of the circumstances may for obvious reasons support a finding of unfitness within the statutory contemplation. On the other hand, where the applicant is an inactive member of a political organization which, though ideologically favoring the forceful overthrow of democratic government, has no paramilitary or weapons-gathering aspects, the totality of the circumstances may for equally obvious reasons support a finding of fitness within the statutory contemplation. In any event, the administrative official will, in the first instance, have the direct responsibility of passing judgment on the applicant's fitness on the basis of his full investigation; the official's judgment will be reviewable in the county court (N.J.S. 2A:151-34) and the county court's action will, in turn, be reviewable in the Appellate Division (R.R. 2:2-1) and in this Court if necessary. R.R. 1:2-1; R.R. 1:10-2.

In *Konigsberg, supra,* the petitioner sought to be admitted to practice law in California. He declined to answer questions addressed to him by the Committee of Bar Examiners as to his present and past membership in the Communist Party on the ground that the questions infringed upon his constitutional freedoms of speech and association. The Committee refused to certify him for admission because his refusals to answer had obstructed a full investigation into his qualifications. This action was sustained by a sharply divided Supreme Court. Speaking for a majority, Justice Harlan rejected the petitioner's contention and in the course of his opinion said:

[G]eneral regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. See, e.g., Schneider v State, 308 US 147, 161, 84 L ed 155, 164, 60 S Ct 146; Cox v New Hampshire, 312 US 569, 85 L ed 1049, 61 S Ct 762, 133 ALR 1396; Prince v. Massachusetts, 321 US 158, 88 L ed 645, 64 S Ct 438; Kovacs v Cooper, 336 US 77, 93 L ed 513, 69 S Ct 448, 10 ALR2d 608; American Communications Asso. v Douds, 339 US 382, 94 L ed 925, 70 S Ct 674; Breard v Alexandria, 341 US 622, 95 L ed 1233, 71 S Ct 920, 35 ALR2d 335. It is in the latter class of cases that this Court has always placed rules compelling disclosure of prior association as an incident of the informed exercise of a valid governmental function. Bates v Little Rock, 361 US 516, 524, 4 L ed 2d 480, 486, 80 S Ct 412. Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved. Watkins v United States, 354 US 178, 198, 1 L ed 2d 1273, 1290, 77 S Ct 1173; National Asso. for Advancement of Colored People v Alabama, 357 US 449, 2 L ed 2d 1488, 78 S Ct 1163, supra; Barenblatt v United States, 360 US 109, 126, 127, 3 L ed 2d 1115, 1128, 1129, 79 S Ct 1081; Bates v Little Rock (US) supra; Wilkinson v United States,

365 US 399, 5 L ed 2d 633, 81 S Ct 567; Braden v United States, 365 US 431, 5 L ed 2d 653, 81 S Ct 584. With more particular reference to the present context of a state decision as to character qualifications, it is difficult, indeed, to imagine a view of the constitutional protections of speech and association which would automatically and without consideration of the extent of the deterrence of speech and association and of the importance of the state function, exclude all reference to prior speech or association on such issues as character, purpose, credibility, or intent. 366 U.S. at 50-51, 6 L.Ed.2d at 116-17.

New Jersey's interest in preventing the gathering of firearms by groups dedicated to the forceful overthrow of the Government or the forceful denial of constitutional rights appears to exceed by far the interest of the State advanced in *Konigsberg*. *See* 97 N.J. Super. at 68. And the intrusions on speech and association as well as the jeopardies to private interests would appear to be much lesser in nature. If, as *Konigsberg* and other Supreme Court opinions indicate, balancing is appropriate, then surely New Jersey's interest is "sufficient to outweigh the minimal effect upon free association" occasioned by compulsory disclosures of membership in organizations of the type inquired about here. *See* 366 U.S. at 52, 6 L.Ed. 2d at 118. While the Gun Control Law seeks to avoid weapons gathering by threatening groups (97 N.J. Super. at 68), it is in nowise aimed at penalizing political beliefs. It places the burden of investigating and justifying any denial on the administrative official and contains ample protection, including full judicial review, against arbitrary action. *See* 366 U.S. at 52-56, 6 L.Ed.2d at 118-20.

The appellant contends that "the *Konigsberg* case has been overruled" by the decisions in *United States* v. *Brown*, 381 U.S. 437, 14 L.Ed.2d 484 (1965) and *Aptheker* v. *Secretary of State, supra,* 378 U.S. 500, 12 L.Ed.2d 992, and that it should therefore "neither control nor guide this Court in its analysis of the matter now pending." The majority opinions in *Aptheker* and *Brown* do not mention *Konigsberg* and do not suggest any constitutional infirmity in the course taken by New Jersey's Legislature in N.J.S. 2A:151-35. In *Aptheker* the Supreme Court struck down § 6 of the Subversive Activities Control Act of 1950 which declared it unlawful for a member of a Communist organization to apply for or use a passport of the United States. The Court's opinion pointed out that the statutory restriction against the right to travel was entirely too broad for it rendered "irrelevant the member's degree of activity in the organization and his commitment to its purpose" and it applied "regardless of the purposes" for which the individual wished to travel. 378 U.S. at 510, 511, 12 L.Ed.2d at 1000. In other words the exclusion was automatic because of the membership in the communistic organization; in clear contrast, the listing of any organizational membership in response to an inquiry under N.J.S. 2A:151-35 simply serves as a factor in aid of the investigation by the administrative official whose ultimate and reviewable judgment will rest on a weighing of all of the pertinent factors in the light of the evils sought to be curbed by New Jersey's Gun Control Law.

In *Brown* the petitioner had been convicted of violating § 504 of the Labor-Management Reporting and Disclosure Act of 1959 which made it a crime for a Communist Party member to serve as a union officer or employee. The con-

viction was reversed in the Court of Appeals and this was sustained by the Supreme Court in an opinion which declared § 504 to be unconstitutional as a bill of attainder. In his opinion for the majority, Chief Justice Warren acknowledged that Congress had authority to enact legislation designed to keep from positions affecting commerce "persons who may use such positions to bring about political strikes." 381 U.S. at 449-50, 14 L.Ed.2d at 492. But Congress had exceeded its authority by designating members of the Communist Party as the objectionable persons rather than by setting forth "a generally applicable rule decreeing that any person who commits certain acts or possesses certain characteristics (acts and characteristics which, in Congress' view, make them likely to initiate political strikes) shall not hold union office", and leaving "to courts and juries the job of deciding what persons have committed the specified acts or possessed the specified characteristics." 381 U.S. at 450, 14 L.Ed.2d at 492. That New Jersey's Gun Control Law satisfies the foregoing and embodies none of the aspects of a bill of attainder is readily apparent and requires no elaboration here. *See* N.J.S. 2A:151-33; 97 N.J. Super. at 74.

The appellant places considerable reliance on *Elfbrandt* v. *Russell, supra,* 384 U.S. 11, 16 L.Ed.2d 321 and *Keyishian* v. *Board of Regents, supra,* 385 U.S. 589, 17 L.Ed.2d 629 and is critical of the Appellate Division's distinguishing comment that those cases dealt with the academic freedom of teachers, an area which the Supreme Court considers to be "a special concern" of the first amendment. *See* 97 N.J. Super. at 71. *Elfbrandt* and *Keyishian* do not in any event furnish any substantial support for the appellant's attack on N.J.S. 2A:151-35. In *Elfbrandt* the Court invalidated an Arizona loyalty oath which state

employees were required to take. A person who subscribed to the oath and was or thereafter became a knowing member of an organization which had as one of its purposes the violent overthrow of the Government was subject to immediate discharge and criminal penalties. Nothing in the oath purported to exclude association by one who did not subscribe to the organization's unlawful end. In the course of his opinion for the majority, Justice Douglas expressed the thought that "those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees." And he noted that "laws such as this which are not restricted in scope to those who join with the 'specific intent' to further illegal action impose, in effect, a conclusive presumption that the member shares the unlawful aims of the organization" and are therefore unconstitutional. 384 U.S. at 17, 16 L.Ed.2d at 325. New Jersey's law imposes no such conclusive presumption; on the contrary, the applicant may qualify his answer in any manner he sees fit and the administrative official's investigation proceeds from that point on; and there would be no sufficient basis for a finding of unfitness if it appeared that the applicant did not share the unlawful aims of the organization and that the granting of his application would not imperil the legitimate goals of the Gun Control Law.

In *Keyishian* the Court struck down the teacher's loyalty oath of New York on various grounds which have little or no pertinency here. It found statutory ambiguities and obscurities which might prohibit the employment of one who merely advocated the forceful overthrow of government "in the abstract without any attempt to indoctrinate others, or incite others to action in furtherance of unlawful

aims." 385 U.S. at 599-600, 17 L.Ed.2d at 638. It further found that under the statute "proof of nonactive membership or a showing of the absence of intent to further unlawful aims" would not rebut the statutory presumption of disqualification or prevent the dismissal of the employee. 385 U.S. at 608, 17 L.Ed.2d at 644. In effect, the Court was applying the holding in *Elfbrandt* which has no controlling applicability here. *See* Israel, *supra,* 1966 Supreme Court Review 193; Note, *supra,* "Loyalty Oaths," 77 Yale L.J. 739.

In the light of all of the foregoing we find, as did the Appellate Division, that the inquiry called for by N.J.S. 2A:151-35 is not unconstitutionally vague or overbroad. However, in doing so, we reiterate the sweep of the applicant's freedom in qualifying his responses to the inquiry. Thus he may answer negatively without more, or affirmatively as to known organizations, or by a denial of knowledge as to doubtful organizations. He may include such explanations as he considers appropriate, and may expressly confine his answers to present and recent memberships, pointing out that since the sole issue is his current qualification to purchase and carry weapons, his past memberships may be inquired about only to the extent that they are relevant and reasonably related to his present fitness. *Cf. Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 244-47, 1 L.Ed.2d 796, 804-06 (1957); *Lowenstein* v. *Board of Education,* 33 N.J. 277, 284-89 (1960), s.c. 35 N.J. 94 (1961). Whatever the answers, the administrative official who has the affirmative burden of determining whether the applicant is qualified or disqualified, will decide what further inquiry, if any, is necessary. In the case before us, there was no answer to the pertinent inquiry

and we reject the appellant's position that he was constitutionally privileged under the first amendment to refuse to answer it at all. Accordingly, the judgment of the Appellate Division is:

Affirmed, without prejudice to a new application and without costs at any level.

Opinion of the Appellate Division

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-458-66

In re: APPLICATION OF WALTER MARVIN, JR.,

Appellant.

Argued May 1, 1967. Decided September 29, 1967.

Before Judges Sullivan, Kolovsky and Carton.

On appeal from Monmouth County Court.

The opinion of the court was delivered by CARTON, J.A.D.

Applicant Walter Marvin, Jr. seeks to review the County Court's denial of his application for a firearms purchaser identification card. The Chief of Police of Middletown Township denied the application because applicant failed to answer certain questions on the form provided as to his membership in subversive organizations or those which seek to deprive others of their constitutional rights. N.J.S. 2A:151-35.

After a prompt hearing held before the Monmouth County Court in the manner provided for review in the statute, the trial judge upheld the action of the police chief and rejected the claims of the applicant that the First Amendment to the Constitution forbids the statutory directed inquiry and that the statute is void for vagueness.

The application form promulgated by the Superintendent of State Police, pursuant to statutory direction, contains three questions to which the applicant objects:

> "#22. Are you presently or have you ever been a member of any organization which advocates or approves the commission of acts of force or violence, either to overthrow the government of the United States or of this State, or which seeks to deny others of their rights under the Constitution of either the United States or the State of New Jersey? Yes or No.
>
> #23. If yes to the above question, what is the name of the organization?
>
> #24. Date of Membership."

These questions follow others inquiring as to whether the applicant is a former criminal, alcoholic, habitual drunkard or narcotics addict and are made pursuant to N.J.S. 2A:151-35 which, in pertinent part, requires the applicant to answer:

> "* * * whether he presently or ever has been a member of any organization, which advocates or approves the commission of acts of force and violence either to overthrow the Government of the United States or of this State, or which seeks to deny others their rights under the Constitutions of either the United States or the State of New Jersey, * * *."

We note in passing an inadvertent substitution of the word, "or," for the word, "and," in the statutory phrase, "force and violence;" the use of "or" in the conjunctive is commonplace in the law.

It should also be noted that N.J.S. 2A:151-44.2, although not directly challenged in this action, requires in parallel language that similar questions be included on applications for permits to carry a pistol or revolver. If the applicant provides false information in applying for any of these then he may be found guilty of a high misdemeanor. N.J.S. 2A:151-48.

Applicant claims that he is an active gun enthusiast, that he lectures on firearms and that, as owner of some fifty rifles and shotguns, he needs the identification card in order to transport these guns to various lectures and related activities. Contrary to the contention of the State of New Jersey, these circumstances surely invest him with standing to complain. The contention that applicant's motion for hearing and his subsequent appeal are premature is also without merit.

Basically, applicant here claims that his refusal to provide information as to his membership in certain groups is not such a relevant consideration that it would alone justify denial of the card and put him to the choice either of answering and thus revealing his associational interests or accepting the continued denial of the permit. The procedure chosen by the applicant has squarely raised this issue.

Two companion cases in the United States Supreme Court have dealt with a similar question, whether a candidate for admission to the Bar could be constitutionally denied admission upon his refusal to answer any questions as to his membership in the Communist Party or other listed organizations. Both resolved this conflict of State and private interests in favor of the State's need to obtain an answer to an inquiry relevant to the applicant's qualifi-

cations. *Konigsberg v. State Bar of California,* 366 U.S. 36, 81 S. Ct. 997, 6 L. ed. 2d 105 (1961); *In re Anastaplo,* 366 U.S. 82, 81 S. Ct. 978, 6 L. ed. 2d 135 (1961). See also *Garner* v. *Board of Public Works of City of Los Angeles,* 341 U.S. 716, 71 St. Ct. 909, 95 L. ed. 1317 (1951) (refusal to take oath of non-membership).

To answer the plaint of the applicant by emphasizing that he could still obtain the card by simply answering the question is to misconstrue the manner in which he considers himself aggrieved. The question is whether it is permissible for the State to ask, not whether it may deny upon receiving an affirmative answer.

The applicant also has standing to complain that the statute is void for vagueness under the First Amendment. The dilemma within which the asserted vagueness places the applicant invests him with standing; he may either refuse to answer and suffer a proper denial of issuance or answer and run the risk of a criminal proceeding for providing false information. *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 82 S. Ct. 275, 7 L. ed. 2d 285 (1961). This despite the fact that in any such criminal proceeding any vice of overbreadth to which the statute is subject, and of which he was unaware, would negative scienter on his part.

Whether the associational interests indicated by the statute bear a reasonable relationship to the obligation of the State to ensure that only qualified individuals receive identification cards for firearms, and whether the inquiry is so peculiarly responsive to the evil which the statute was designed to reach that it justifies the restrictions placed on the individual's associational privacy must now be determined.

The danger to law and order represented by armed, organized groups far exceeds that posed by any individual. These organizations can quickly magnify the destructive potential of individual, armed members and form bands capable of both confronting and challenging the authority of the local police. Such groups may provoke riots and other forms of domestic unrest whose intensity and duration will be directly related to the armed power possessed by the group. They also may by their presence deter others from protesting peaceably and eventually encourage these non-violent organizations to take up arms in response to their activities.

The State may not safely ignore such threats. Nor does the Constitution require the State to remain helpless when timely safeguards are deemed necessary to assure the maintenance of law and order and to guarantee others the continuing exercise of their civil rights.

Justice Frankfurter also gave expression to this thought:

> "The Constitution of the United States does not render the United States or the States impotent to guard their governments against destruction by enemies from within. It does not preclude measures of self-protection against anticipated overt acts of violence. Solid threats to our kind of government—manifestations of purposes that reject argument and the free ballot as the means for bringing about changes and promoting progress—may be met by preventive measures before such threats reach fruition. * * *" *Wieman* v. *Updegraff*, 344 U.S. 183, 195, 73 S. Ct. 215, 97 L. ed. 216, 224 (1952) (concurring).

In this case the inquiry made is directly relevant to the governmental interest in the "public health, safety or welfare" (N.J.S. 2A:151-33) and may indeed be necessary to insure the preservation of our democratic processes.

Similar inquiries have been considered justifiable when the non-respondent sought to obtain a position of power or trust; or when the misuse of that power could seriously dislocate the social system. See *Garner* v. *Board of Public Works,* 341 U.S. 716, 71 S. Ct. 909, 95 L. ed. 1317 (1951) (municipal employees); *American Communications Association* v. *Douds,* 339 U.S. 382, 70 S. Ct. 674, 94 L. ed. 925 (1950) (power of union official to call a political strike). Here the applicant seeks not a position of power but an instrument of power; the dangerous potential possessed by organized, armed groups may far exceed any power conferred by position and certainly justifies inquiry by the State. By comparison, members of those organizations known to engage in only peaceful protest would not be required to disclose membership and the applicant could answer the inquiry as to membership (#22) in the negative. *Cf. Gibson* v. *Florida Legislative Investigation Committee,* 372 U.S. 539, 83 S. Ct. 889, 9 L. ed. 2d 929 (1963).

Parallel concerns are involved in those cases which justify inquiry as to membership in a group, the conduct of which the state has a right to prohibit and those cases which uphold the validity of a statute when challenged for overbreadth in its prohibition of group activity; in both instances the justificatory and dispositive circumstances may be found in the potentiality for violence of one group not possessed by the other. This distinction was aptly delineated by Justice Goldberg in *Cox* v. *Louisiana,* 379 U.S. 536, 574, 85 S. Ct. 453, 13 L. ed. 2d 471, 498 (1965):

> "We reaffirm the repeated holdings of this Court that our constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful social protest, so important to the freedoms treasured in a democratic society. We also reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty under law. * * * "

The required information is reasonably calculated to furnish the officer with pertinent information to enable him to investigate further before deciding whether the identification card should issue to the applicant. Failure to answer thus provides a sufficient reason for denial.

The applicant next contends that, if he answers, he will be subject to a potential penalty for his lack of knowledge of the purpose and objectives of any organization to which he may belong. This is one aspect of his claim that the statute is void for vagueness. N.J.S. 2A:151-48 provides:

> "Any person who gives or causes to be given any false information, or signs a fictitious name or address, in applying for a firearms purchaser identification card or a permit to purchase or a permit to carry a pistol, revolver, or other firearm, or in completing the certificate or any other instrument required by this act in purchasing or otherwise acquiring delivery of any rifle, shotgun, pistol, revolver or other firearm is guilty of a high misdemeanor. As amended L. 1966, c. 60, § 39."

Scienter must still be established, for the statute requires it to be shown that the accused knew of the purpose of the organization at the time he answered the questions. *Cf.*

Garner v. *Board of Public Works, supra,* 341 U.S. at 724, 71 S. Ct. at 914, 95 L. ed. at 1324-1825. Possession while committing or attempting to commit a crime is *prima facie* evidence of the intention to commit the crime with the firearm, N.J.S. 2A:151-6; the presence of a firearm in a vehicle is presumptive evidence of possession by all persons in the vehicle, N.J.S. 2A:151-7. In this case the application for an identification card has not been considered such a persuasive circumstance by the Legislature that it has chosen to make explicit by statute any change in the normal burden of proof placed on the prosecution.

In recent cases involving oaths administered to state employees, the Court has declared invalid statutes which apply to membership without the "specific intent" to further the illegal aims of the organization. *Keyishian* v. *Board of Regents of the University of the State of New York,* —— U.S. ——, 87 S. Ct. ——, 17 L. ed. 2d 629 (1967); *Elfbrandt* v. *Russell,* 384 U.S. 11, 86 S. Ct. 1238, 16 L. ed. 2d 321 (1966). Both cases dealt with the academic freedom of teachers, an area which the Court considered to be "a special concern" of the First Amendment. *Keyishian,* 17 L. ed. 2d at 640. In the present case the legitimate concern of the State is not outweighed by any countervailing interest in obtaining employment or in the free dissemination of ideas.

One possible result of the procedure required by this statute is the discovery of a pattern of purchasing by members of certain organizations. Contrary to the suggestion made by the applicant, the disclosure of membership will not necessarily lead to denial. It may do so where issuance would not be in the interest of public safety and welfare.

Applicant's attack is also against the use of the word, "approves," which he considers to be significantly more inclusive than the word, "advocates." While "approves" may have many meanings, it achieves contextual specificity when it is included in a phrase whose obvious subject matter is the willingness of an organization to use force and violence and when it is used in tandem with the word, "advocates," with which under the particular circumstances it becomes substantially synonymous. See *State* v. *Smith,* 46 N.J. 510, 518 (1966), *cert. denied* 385 U.S. 838 (1966); *City of Springfield* v. *Commonwealth,* 349 Mass. 267, 207 N.E. 2d 891, 894 (Sup. Jud. Ct. 1965). In dealing with the verbal context of words of general import our Supreme Court has noted that "particular words may be enlarged or restricted in meaning by their associates and the evident spirit of the whole expression." *Salz* v. *State House Commission,* 18 N.J. 106, 111 (1955).

The situational and verbal contexts leave no doubt as to the meaning of this word. Several circumstances erase any notion that it was directed to the mere advocacy of ideas. The question is asked on a form dealing solely with the acquisition of instruments of violence; the question is directed to an actual member of an organization approving such acts; and the question pairs together the concepts of advocacy and approval. The context unambiguously informs the applicant that here approval is tantamount to advocacy of the commission of facts of violence and that it does beyond mere attraction to certain abstract concepts.

The applicant also claims that the second phrase dealing with organizations which seek to deny others their civil rights is void for vagueness. The whole clause now challenged is:

> " * * * whether he presently or ever has been a member of any organization, which advocates or approves the commission of acts of force and violence either to overthrow the Government of the United States or of this State, or which seeks to deny others their rights under the Constitutions of either the United States or the State of New Jersey, * * * ."

The phrase following "either to overthrow" lacks on first inspection that parallelism of expression which could easily be restored by striking the words, "which seeks." The juxtaposition of the denial clause with that dealing with subversive activities, the obvious attempt to use parallel language and the subject matter involved, *firearms,* all clearly indicate that the Legislature intended to include only those groups that go beyond peaceable protest.

It is a recognized principle of statutory construction that the court may delete words or phrases when it is necessary to carry out the legislative intent and it is apparent that the words were erroneously inserted. 2 *J. G. Sutherland, Statutory Construction,* § 4926 (3d ed. 1943).

The statute on its face contains a readily discernible grammatical error; the choice here is only between the elimination of the word, "either," or the striking of "which seeks." Since the legislative intention can be ascertained with reasonable certainty, the latter alternative should be chosen to effectuate that intent and to avoid any inconsistency therewith. *Cf. Robson* v. *Rodriguez,* 26 N.J. 517, 528 (1958).

The comma following "this State" also seems to suggest that this whole latter clause modifies "organization" alone and that it does not include any restriction that the organization be one advocating or approving the use of force.

The use of the word, "either," to introduce two coordinate phrases negatives such an interpretation. Moreover, in the context of an application for the use of an instrument of force or violence, the very situation compels the conclusion that the commission of such acts is a referent common to both. When, as here, the dominant statutory purpose is clear, the court may disregard punctuation or even repunctuate in its search for the legislative intention. See *Weinacht* v. *Board of Chosen Freeholders of Bergen County*, 3 N.J. 330, 333-334 (1949).

This interpretation is consistent both with the clear legislative intent and with the demarcation line previously found in decisions of the United States Supreme Court; the distinction made is between those organizations believing in peaceable protest and those willing to use force. The applicant should encounter no difficulty in determining whether any organization to which he belongs advocates or approves of the use of violence, an egregious characteristic to say the least. See, however, Comment, "Firearms: Problems of Control," 80 Harv. L. Rev. 1328 (1967) in which this section of the New Jersey Statute is specifically considered and the ability to identify these organizations questioned.

Finally, the applicant attacks the entire question propounded as being void for vagueness. In drafting such statutes legislatures must avoid the vice both of underinclusiveness and overinclusiveness. The first is usually committed by designating an organization by name, which results in the statute's being declared a bill of attainder; the second occurs when the statute is declared void for vagueness, or as a bill of attainder which overlooks the scienter of members of a named organization. Compare *United*

States v. *Brown*, 381 U.S. 437, 85 S. Ct. 1707, 14 L. ed. 2d 484 (1965) with *Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 82 S. Ct. 275, 7 L. ed. 2d 285 (1961).

Viewing the question as a whole, it would appear that the Legislature has steered a course avoiding both of these objections. Even in *Cramp* the Court recognized that the phrase, "advocacy of violent overthrow of state or federal government," included terms capable of objective measurement. (368 U.S. at 286, 7 L. ed. 2d at 291) The organizations in the statute have been described by both purpose and means. To go further and designate them by name would incur valid objections to the statute as a bill of attainder. And in this case the specific means which concerned the Legislature are all too obvious from the very purpose of the application.

One practical consideration remains. At the oral argument counsel raised the question whether an applicant for an identification card could properly be burdened with the obligation of being aware of the interpretation placed upon the statute by the court. The point raised was that the application form should be self-contained and sufficiently unambiguous so as not to require reference to any other document. Since this is an administrative problem, it can readily be solved by an appropriate modification in the application form in accordance with this decision.

Affirmed.

Opinion of Monmouth County Court, October 28, 1966

The Court: Sometime prior to August 29, 1966 the application was made in accordance with the statute to the Chief of Police of Middletown Township. The applicant in this Court's view, having had a photostatic copy of what purports to be the actual application, apparently answered all of the required questions except Number 22, Number 23 and Number 24, and with reference to those the applicant had written or printed, "See reverse side." and then he attached or wrote upon the reverse side as follows:

> "I decline to answer this question because it seeks to penalize membership in organizations against which there has been no judicial finding of the commission of a crime. Moreover, the vagueness and imprecise language of the question expose the applicant to heavy penalties unfairly. Inasmuch as giving 'false information' in response to any question on this application, including Question 22, is a high misdemeanor under N.J.S. 2A:151-48, I invoke the dictum of the United States Supreme Court that the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject under it what conduct will render them liable to those penalities."

On August 26, 1966 the chief of police denied the application of the applicant, Warren Marvin, Jr., on the grounds that he failed to properly answer all questions as set forth in the application.

The statute, 2A:151-34, second paragraph, provides:

> "Any person aggrieved by the denial of a permit or identification card may request a hearing in the County Court of the county in which he resides, if he is a resident of New Jersey, or in the County Court of the county in which his application was filed if he is a nonresident."

So that brings the matter to this court.

Petitioner claims the question is of constitutional dimension, that it offends his rights under the First Amendment to the Federal Constitution and the Second Amendment and that, furthermore, it is vague, the language of the question is vague. The First Amendment reads:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the Government for a redress of grievances."

The First Amendment has been made applicable to the states under the Fourteenth Amendment.

The Second Amendment of the Federal Constitution which is claimed to be violated reads as follows:

> "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed."

The Second Amendment has never been extended to the states under the Fourteenth Amendment so far as this Court knows. The Second Amendment is not involved in this matter in the slightest. There is no question in this

Court's mind at this stage that this act that we are talking about, 2A:151-1 et seq., is in any way violative of the Second Amendment of the Federal Constitution. Do you agree with me, Mr. Schottland?

Mr. Schottland: Yes, sir.

The Court: All right. The First Amendment is claimed to be violated by reason of the requirement of the applicant to answer this question which I previously read into the record, in essence, "Are you presently or have you ever been a member of any organization which advocates or approves the commission of acts of force or violence either to overthrow the Government of the United States or of this State?" The cases you cite thereunder have no application here. They all involve oaths, oaths required of employees, school teachers, for example, and by their failure to take the oath they are deprived of their livelihood. We don't have that situation. The First Amendment is not offended here, and I so find.

As to the argument of vagueness, the cases cited thereunder all apply to statute regulations which result in incarceration, loss of liberty or fines. We don't have that question before us and that ground is without merit. There is no analogous section in the New Jersey Constitution of either that or the Second Amendment and I find no statute relating to it. I want to add that to what I said previously.

It would be foolhardy for any court to say that the legislature of this state cannot authorize the persons authorized in this act, that is, the Superintendent of the State Police or the local police agent, to inquire into those seeking to carry, transport or traffic in guns. It is absolutely foolhardy. It is a warranted exercise of the police power. Obviously the state and the municipal or any governmental

agency is going to be concerned with who carries guns, who purchases guns, who traffics in guns because the welfare of the public, the health and safety is involved and if there was some tinge of a violation of a constitutional right I believe this and other courts would be required to weigh the equities as between the various rights, the right of the individual on one hand to obtain a gun, to carry a gun, to traffic in guns and right of the public on the other hand to be secure in their person as against some person not mentally or constitutionally able to carry and use and have a gun in his possession.

I find from this record, from an examination of the statute, from an examination of the brief of the applicant and also the Attorney General it is a valid exercise of police power to put the power in the police chief's hands, in this instance, to first obtain the application from the applicant. Nowhere in the act does it say that if a person answers yes to Question No. 22, that they do belong to such an organization and then identify it, that they will be deprived of obtaining the purchaser identification card, nowhere in the statute. If it did it would be quite another thing. A person can say to that question, "Yes, I belong to such an organization and the name of it is the XYZ Association." and then the police chief, the police authority would be in a position to examine and investigate further as to whether or not the applicant would be a good risk to be carrying around a machine gun or a shotgun or a revolver. He might very well find that the applicant would not be a good risk, in which event, as I read the act, it would be within the power of the chief to deny the application. Then the matter under the statute would come back to this court, a County Court, for review to ascertain whether or not the police chief, or whoever denied the application, acted ca-

priciously or whether they acted within the authority and power granted to them under the statute. We don't have that situation. If this applicant is being deprived of transporting his firearms from his home to another place to lecture or to show them, he has the power in his own hands to answer the question and let the police chief pass on it in the first instance as to whether or not he is a proper party to have such card and as long as he fails to do it he will have to keep his guns at home.

Now, even if the First Amendment were involved it is not unusual for governmental authorities to exercise control over applicants and require that they answer questions as to associations, societies or organizations that they belong to and while it is not mentioned in either of the briefs I think of significance is Konigsberg against the State Bar of California, 366 U.S. 36, 81 S. Ct. 997.

It is easy to put labels on things and make these questions seem so simple. All you have to do is pull out a certain label or handle, put it on and then condemn it, but that's because of shallow research. Research in depth will show that these constitutional rights are not so easily overcome. In the Konigsberg case the State of California before admission to the Bar required of its applicants to qualify for certification, among other things, a good moral character. I quote: "No person may be certified who advocates the overthrow of the Government of the United States or of this State by force, violence or other unconstitutional means."

Our United States Supreme Court in the decision I have just mentioned reversed the Circuit Court and upheld an inquiry about the applicant's membership in the Communist Party.

Now, that case indicates to this Court that even if the First Amendment were involved it would be required of the Court to weigh the equities and not strike N.J.S.A. 2A:151-35 down strictly because it happens to be within the simple language of the Amendment.

Finally, I find that the regulations set forth in the statute are clearly within the police power and that in the limited area before this Court there is no violation of the Federal Constitution nor of the state constitution. I only say that in passing, not meaning to infringe upon any other appeal that may be pending. I am not concerned with that. I am concerned with a very limited section of this act.

I find as a fact that the Chief of Police of the Township of Middletown acted properly and in accordance with the said section and was within his right in denying the application of the petitioner for all of the reasons aforesaid.

I believe I have covered all the questions raised, gentlemen.

Mr. Hayden: Yes, sir.

The Court: If someone will present an order.

Mr. Hayden: Yes, sir, I will present an order.

* * * * *

Certified as a true and accurate transcript of stenographic notes.

VINCENT G. DE BONIS
Official Stenographic Reporter

State of New Jersey
(Type or print ALL answers)

CHECK APPROPRIATE BLOCK
☐ Application for Permit to Purchase pistol or revolver (Submit in duplicate)
☒ Application for Firearms Purchaser Identification Card COPY

(1) LAST NAME (IF FEMALE, INCLUDE MAIDEN) FIRST MIDDLE	(2) RESIDENT ADDRESS NUMBER-STREET CITY-STATE-ZIP CODE
MARVIN, WALTER, JR.	245 KINGFISHER DR., MIDDLETOWN, N.J.

(3) DATE OF BIRTH MONTH / DAY / YEAR	(4) AGE	PLACE OF BIRTH CITY, STATE OR COUNTRY	(5) CITIZEN YES OR NO	(6) SOCIAL SECURITY NUMBER
7 / 3 / 1924	57	BROOKLYN, N.Y.	YES	143 22 7302

(7) SEX	HEIGHT	WEIGHT	EYES	COMPLEXION	(8) DISTINGUISHING PHYSICAL CHARACTERISTICS
M	5'10"	170	BLUE	FAIR	NONE

(9) OCCUPATION	(10) NAME AND ADDRESS OF EMPLOYER OR PLACE OF BUSINESS	(11) EMPLOYER'S TELEPHONE NO.
ENGINEER	TEMPLAR, INC., S. RIVER, N.J.	201-254-2424

	YES OR NO	IF YES, LIST DATE(S) PLACE(S) OFFENSE(S)
(12) HAVE YOU EVER BEEN ADJUDGED A JUVENILE DELINQUENT?	NO	
(13) HAVE YOU EVER BEEN CONVICTED OF A CRIME OR DISORDERLY PERSONS OFFENSE?	NO	
(14) HAVE YOU EVER HAD A PERMIT TO PURCHASE A PISTOL OR A REVOLVER REFUSED?	NO	IF YES, BY WHOM WHERE WHEN WHY
(15) HAVE YOU EVER HAD A PERMIT TO CARRY A PISTOL OR REVOLVER OR FIREARMS ID CARD REFUSED OR REVOKED?	NO	IF YES, BY WHOM WHERE WHEN WHY
(16) ARE YOU AN ALCOHOLIC?	NO	
(18) ARE YOU A HABITUAL DRUNKARD?	NO	
(19) ARE YOU ADDICTED TO NARCOTICS?	NO	
(21) ARE YOU A HABITUAL USER OF GOOFBALLS OR PEP PILLS?	NO	

(17) HAVE YOU EVER BEEN CONFINED OR COMMITTED TO A MENTAL INSTITUTION OR HOSPITAL FOR TREATMENT OR OBSERVATION OF A MENTAL OR PSYCHIATRIC CONDITION ON A TEMPORARY, INTERIM OR PERMANENT BASIS? — YES OR NO: NO

IF YES GIVE THE NAME AND LOCATION OF THE INSTITUTION OR HOSPITAL AND THE DATE(S) OF SUCH CONFINEMENT OR COMMITMENT.

(20) HAVE YOU EVER BEEN ATTENDED, TREATED OR OBSERVED BY ANY DOCTOR OR PSYCHIATRIST OR AT ANY HOSPITAL OR MENTAL INSTITUTION ON AN IN-PATIENT OR OUT-PATIENT BASIS FOR ANY MENTAL OR PSYCHIATRIC CONDITION? — YES OR NO: NO

IF YES, GIVE THE NAME AND LOCATION OF THE DOCTOR, PSYCHIATRIST, HOSPITAL OR INSTITUTION AND DATE(S) OF SUCH OCCURRENCE.

(21A) DO YOU SUFFER FROM AT — YES OR NO

(21B) IF THE ANSWER TO (21A) IS YES, DOES THIS MAKE IT UNSAFE FOR YOU TO HANDLE FIREARMS? IF NOT, EXPLAIN.

State of New Jersey
(Type or print ALL answers)

CHECK APPROPRIATE BLOCK
☐ Application for Permit to Purchase pistol or revolver (Submit in duplicate)
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(7) SEX	HEIGHT	WEIGHT	EYES	COMPLEXION	(8) DISTINGUISHING PHYSICAL CHARACTERISTICS
M	5'10"	170	BLUE	FAIR	NONE

(9) OCCUPATION	(10) NAME AND ADDRESS OF EMPLOYER OR PLACE OF BUSINESS	(11) EMPLOYER'S TELEPHONE NO.
ENGINEER	TEMPLAR, INC., S. RIVER, N.J.	201-254-2424

	YES OR NO	IF YES, LIST DATE(S) PLACE(S) OFFENSE(S)
(12) HAVE YOU EVER BEEN ADJUDGED A JUVENILE DELINQUENT?	NO	
(13) HAVE YOU EVER BEEN CONVICTED OF A CRIME OR DISORDERLY PERSONS OFFENSE?	NO	
(14) HAVE YOU EVER HAD A PERMIT TO PURCHASE A PISTOL OR A REVOLVER REFUSED?	NO	IF YES, BY WHOM WHERE WHEN WHY
(15) HAVE YOU EVER HAD A PERMIT TO CARRY A PISTOL OR REVOLVER OR FIREARMS ID CARD REFUSED OR REVOKED?	NO	IF YES, BY WHOM WHERE WHEN WHY

	YES OR NO		YES OR NO
(16) ARE YOU AN ALCOHOLIC?	NO	(17) HAVE YOU EVER BEEN CONFINED OR COMMITTED TO A MENTAL INSTITUTION OR HOSPITAL FOR TREATMENT OR OBSERVATION OF A MENTAL OR PSYCHIATRIC CONDITION ON A TEMPORARY, INTERIM OR PERMANENT BASIS?	NO
(18) ARE YOU A HABITUAL DRUNKARD?	NO	IF YES GIVE THE NAME AND LOCATION OF THE INSTITUTION OR HOSPITAL AND THE DATE(S) OF SUCH CONFINEMENT OR COMMITMENT.	
(19) ARE YOU ADDICTED TO NARCOTICS?	NO	(20) HAVE YOU EVER BEEN ATTENDED, TREATED OR OBSERVED BY ANY DOCTOR OR PSYCHIATRIST OR AT ANY HOSPITAL OR MENTAL INSTITUTION ON AN IN-PATIENT OR OUT-PATIENT BASIS FOR ANY MENTAL OR PSYCHIATRIC CONDITION?	NO
(21) ARE YOU A HABITUAL USER OF GOOFBALLS OR PEP PILLS?	NO	IF YES, GIVE THE NAME AND LOCATION OF THE DOCTOR, PSYCHIATRIST, HOSPITAL OR INSTITUTION AND DATE(S) OF SUCH OCCURRENCE.	
(21A) DO YOU SUFFER FROM A PHYSICAL DEFECT OR SICKNESS?	YES	(21B) IF THE ANSWER TO (21A) IS YES, DOES THIS MAKE IT UNSAFE FOR YOU TO HANDLE FIREARMS? IF NOT, EXPLAIN. CORRECTIVE GLASSES NECESSARY	

(22) ARE YOU PRESENTLY OR HAVE YOU EVER BEEN A MEMBER OF ANY ORGANIZATION WHICH ADVOCATES OR APPROVES THE COMMISSION OF ACTS OF FORCE OR VIOLENCE, EITHER TO OVERTHROW THE GOVERNMENT OF THE UNITED STATES OR OF THIS STATE, OR WHICH SEEKS TO DENY OTHERS OF THEIR RIGHTS UNDER THE CONSTITUTION OF EITHER THE UNITED STATES OR THE STATE OF NEW JERSEY? YES OR NO: SEE REVERSE SIDE

(23) IF YES TO THE ABOVE QUESTION WHAT IS THE NAME OF THE ORGANIZATION?	(24) DATE OF MEMBERSHIP	(25) WHAT IS YOUR PURPOSE FOR PURCHASE OF FIREARM?
		NO FIREARMS PURCHASE CONTEMPLATED.

ANY PERSON WHO GIVES OR CAUSES TO BE GIVEN ANY FALSE INFORMATION, OR SIGNS A FICTITIOUS NAME OR ADDRESS, IN APPLYING FOR A FIREARMS PURCHASER IDENTIFICATION CARD OR A PERMIT TO PURCHASE OR A PERMIT TO CARRY A PISTOL, REVOLVER OR OTHER FIREARM, OR IN COMPLETING THIS CERTIFICATE OR ANY OTHER INSTRUMENT REQUIRED BY THIS ACT IN PURCHASING OR OTHERWISE ACQUIRING DELIVERY OF ANY RIFLE, SHOTGUN, PISTOL, REVOLVER OR OTHER FIREARM, IS GUILTY OF A HIGH MISDEMEANOR - N.J.S. 2A:151-48

(26) SIGNATURE OF APPLICANT: Walter Marvin Jr.

(27) DATE OF APPLICATION	(28) HOME TELEPHONE NUMBER
8 / 26 / 1966	201-671-0376

(29) NAMES AND ADDRESSES OF TWO (2) REPUTABLE PERSONS WHO ARE PERSONALLY ACQUAINTED WITH THE APPLICANT.

RUSSELL H. GRAY, 9 CIRCLE DR., ROWSON, N.Y.

(30) NAME ADDRESS TELEPHONE NUMBER

REV. HAROLD R. DEAN, 1ST UNITARIAN CHURCH OF MONMOUTH CO., LINCROFT, N.J.

NAME ADDRESS TELEPHONE NUMBER

A FEE OF TWO DOLLARS ($2.00) MUST ACCOMPANY THIS APPLICATION. (IF CHECK OR MONEY ORDER, MAKE PAYABLE TO THE DIVISION OF STATE POLICE OR THE CHIEF OF POLICE OF THE MUNICIPALITY WHEREIN THE APPLICANT LIVES)

APPLICANT DO NOT WRITE BELOW THIS LINE

Instructions

AFTER INVESTIGATION AND FINGERPRINT CHECK, ISSUING AUTHORITY MUST COMPLETE BALANCE OF THIS FORM.

THE ORIGINAL COPY OF THE FORM, WITH PERMIT NUMBER OR IDENTIFICATION CARD NUMBER NOTED IN THE PROPER SPACE, MUST BE MAILED TO THE SUPERINTENDENT OF STATE POLICE, TRENTON, NEW JERSEY 08625, FOR REGISTRATION.

I HAVE INVESTIGATED OR CAUSED TO BE INVESTIGATED THE APPLICANT AND FROM THE RESULTS OF SUCH INVESTIGATIONS, THE APPLICATION IS (APPROVED DENIED) BY ME (STRIKE OUT ONE)

(31) PERMIT NUMBER	(32) IDENT CARD NUMBER

THIS _____ DAY OF _____ 19 _____

(33) _____
SIGNATURE TITLE

_____
DEPARTMENT OF POLICE

IF MORE SPACE IS NEEDED TO ANSWER ANY OF ABOVE QUESTIONS, USE REVERSE SIDE

SBI 33 7-66

Application for Firearms Purchaser Identification Card

7

QUESTION 22

I DECLINE TO ANSWER THIS QUESTION BECAUSE IT SEEKS TO PENALIZE MEMBERSHIP IN ORGANIZATIONS AGAINST WHICH THERE HAS BEEN NO JUDICIAL FINDING OF THE COMMISSION OF A CRIME.

MOREOVER, THE VAGUENESS AND THE IMPRECISE LANGUAGE OF THE QUESTION EXPOSE THE APPLICANT TO HEAVY PENALTIES UNFAIRLY. INASMUCH AS GIVING "FALSE INFORMATION" IN RESPONSE TO ANY QUESTION ON THIS APPLICATION, INCLUDING QUESTION 22, IS A HIGH MISDEMEANOR UNDER N.J.S. 2A:131-4B, I INVOKE THE DICTUM OF THE U.S. SUPREME COURT THAT THE TERMS OF A PENAL STATUTE CREATING A NEW OFFENSE MUST BE SUFFICIENTLY EXPLICIT TO INFORM THOSE WHO ARE SUBJECT UNDER IT WHAT CONDUCT WILL RENDER THEM LIABLE TO THOSE PENALTIES.

New Jersey Statutes, 2A:151-33

Permit to purchase; identification card; who may obtain. No person of good character and who is of good repute in the community in which he lives, and who is not subject to any of the disabilities set forth in this section of other sections of this chapter, shall be denied a permit to purchase a pistol or revolver or a firearms purchaser identification card, except as hereinafter set forth:

a. No pistol or revolver purchase permit or firearms purchaser identification card shall be issued to any person who has ever been convicted of any crime, to any person addicted to narcotics, or who is a habitual user of goofballs or pep pills, to any person who is confined for a mental disorder to a hospital, mental institution or sanitarium, or to any person who is presently a habitual drunkard; or

b. To any person who suffers from a physical defect or sickness which would make it unsafe for him to handle firearms, to any person who has ever been confined for a mental disorder, or to any alcoholic, unless any of the foregoing persons produce a certificate of a medical doctor or psychiatrist licensed in New Jersey, or other satisfactory proof, that he is no longer suffering from that particular disability in such a manner that would interfere with or handicap him in the handling of firearms; or

c. To any person under the age of 18 years; or

d. To any person where the issuance would not be in the interest of the public health, safety or welfare.

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JUN 18 1969

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 134

IN THE MATTER OF THE APPLICATION
of
WALTER MARVIN, JR.,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

ARTHUR J. SILLS,
Attorney General of New Jersey,
Attorney for Respondents,
State House Annex,
Trenton, New Jersey, 08625.

MARILYN LOFTUS SCHAUER,
First Assistant Attorney General,
Of Counsel.

STEPHEN SKILLMAN,
Assistant Attorney General,
On the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-0511-12

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Counter-Statement of Question Presented

Does the First Amendment to the United States Constitution preclude a State from requiring an individual who desires to purchase or carry a firearm to state whether he is a member of an organization which he knows to advocate the commission of acts of force or violence designed to overthrow the Government or deny others their constitutional rights?

Counter-Statement of the Case

The petitioner, Walter Marvin, Jr., seeks a writ of certiorari to review the judgment of the New Jersey Supreme Court, affirming the refusal of a local chief of police to issue him a firearms purchaser identification card because his application was incomplete. *Application of Walter Marvin, Jr.*, 53 N. J. 147 (1969) (P21 to P32).

The requirement that a firearms purchaser identification card be secured before an individual will be allowed to purchase a rifle or shotgun was imposed by Chapter 60 of the Public Laws of New Jersey of 1966 (N.J.S. 2A:151-1, *et seq.*). The main thrust of Chapter 60 is to prevent dangerous, unfit and criminal elements from acquiring firearms. The legislation seeks to accomplish this objective by providing that a person who desires to purchase firearms must first apply for a firearms purchaser identification card or pistol permit, and that certain classes of persons are not to be granted such cards or permits. N.J.S. 2A:151-33. The Act thus provides that an identification card or permit shall not be issued where the prospective purchaser (1) has been previously convicted of a crime; (2) is addicted to narcotics; (3) is a habitual drunkard; (4) is confined to a hospital for reasons of mental disorder; (5) is a minor under the age of 18 years; or (6) is a person to whom issuance would not be in the interest of the public health, safety, or welfare. N.J.S. 2A:151-33(a), (c) and (d). Persons who have been alcoholics, confined for mental disorders or have suffered from physical defects which would make it unsafe for them to handle firearms must produce satisfactory evidence of their present competency to handle firearms. N.J.S. 2A:151-33(b).

One of the means which the law provides to enable issuing officers to determine whether an applicant for a fire-

arms identification card or pistol permit falls within one of the disqualified classes is the requirement that an application, containing various pertinent information, be submitted. N.J.S. 2A:151-35. The applicant must set forth his name, address, place of business, sex, occupation, age and distinguishing physical characteristics. He must state whether he has ever been adjudged a delinquent or convicted of a crime or disorderly persons offense. He must also indicate whether he is a drug addict or alcoholic, whether he suffers from a physical defect or sickness, and whether he has been confined to an institution or otherwise medically treated for a psychiatric condition. Finally, the applicant is required to indicate whether he is or has ever been a member of an organization which he knows to advocate the commission of acts of force or violence designed to overthrow the government or deny others their constitutional rights.

The permit or identification card is to be granted within 10 days unless good cause for a denial appears. N.J.S. 2A:151-36. Any applicant aggrieved by a denial may, within 30 days of the denial, request a hearing in the appropriate county court and such hearing shall be held within 30 days. N.J.S. 2A:151-34. No formal pleadings nor filing fees are required.

This Court has recently dismissed for lack of a substantial federal question an appeal challenging the constitutionality under the Second Amendment of the general regulatory scheme set forth in Chapter 60. *Burton* v. *Sills*, 53 N. J. 86 (1968), *appeal dismissed* 37 U. S. L. W. 3409-3410 (1969). The present litigation involves a challenge to only a limited aspect of Chapter 60.

When the petitioner applied for a purchaser identification card, he refused to answer the questions relating to membership in any organization advocating commission

of acts of force or violence designed to overthrow the Government or to deny others their constitutional rights. On the back of the application, he specifically stated that his reasons for refusing to answer were that the questions sought to penalize membership in non-criminal organizations and were unconstitutionally vague (P51). Because the application submitted was incomplete, the local chief of police refused to issue petitioner an identification card. A hearing on the application was then held in the county court, which affirmed the chief of police's denial.

The petitioner thereafter appealed unsuccessfully to the Appellate Division and Supreme Court of New Jersey. The construction of the statute by these courts should be noted. Specifically, the New Jersey Supreme Court clearly indicated that the inquiry to which an applicant must respond is "whether he is or ever has been a member of an organization which he knows to advocate the commission of acts of force or violence designed to overthrow the Government or deny others their constitutional rights" (P21 to P22). The court further indicated that this question "may be answered negatively, affirmatively, or qualifiedly" (P24) and that an applicant "may expressly confine his answers to present and recent memberships, pointing out that since the sole issue is his current qualification to purchase and carry weapons, his past memberships may be inquired about only to the extent that they are relevant and reasonably related to his present fitness." (P31a). The court also stressed throughout its opinion that mere membership in an organization would not constitute an adequate grounds on which to deny an application and that the issuing authority "at all times has the affirmative burden of determining whether the applicant is individually qualified or disqualified under the terms of N.J.S. 2A:151-33" (P24).

On this view of the statute's import, the Supreme Court of New Jersey held that the petitioner was not constitutionally privileged under the First Amendment simply to refuse to answer the inquiry. It therefore sustained the refusal to issue petitioner a firearms purchaser identification card, without prejudice to the filing of a new application.

ARGUMENT

POINT I

The First Amendment to the United States Constitution does not entitle an applicant for a firearms purchaser identification card to refuse to state whether he is a member of an organization which he knows to advocate commission of acts of force or violence designed to overthrow the Government or deny others their constitutional rights.

The only question here presented is whether a person who wants to buy a firearm may be required to state whether he is or has ever been a member of any of a class of organizations deemed by the legislature to pose a threat to the public health, safety or welfare. As the New Jersey Supreme Court properly observed: "[The law] does not require any loyalty or comparable oath on sanction of loss of employment or criminal prosecution; it does not prohibit any organizational membership or any organizational act on sanction of criminal or other penalty; and it does not provide for denial of a pistol permit or firearms purchaser identification card because of membership in any designated organization." (P23 to P24). The information sought—membership in an organization advocating use of force or violence designed to overthrow the Government or deny others constitutional rights—is certainly relevant to whether the applicant

should be allowed to purchase a firearm. On the other hand, membership in an organization would not by itself constitute an adequate basis for denying an individual an identification card or gun permit, and the statute so recognizes. Thus, once having been advised that an applicant is a member of such an organization, the issuing officer must proceed to determine the applicant's individual fitness to purchase and carry a firearm, taking into consideration his membership in the organization, the nature of that membership, and any other pertinent information. He then decides whether the "totality of circumstances" indicates that issuance of an identification card to the applicant would "not be in the interest of the public health, safety or welfare." N.J.S. 2A:151-33(d). See *Burton* v. *Sills, supra.* The decisions of this Court interpreting the First Amendment do not indicate any constitutional infirmity in the foregoing procedure for determining an individual's fitness to buy and carry firearms.

In *Konigsberg* v. *State Bar of California,* 366 U. S. 36 (1961), the Court held that even after an applicant for admission to the bar has unequivocally stated that he does not believe in violent overthrow of the Government and has never belonged to an organization advocating such action, he may still be required to answer questions concerning his present or past membership in the Communist Party. The Court found that the Committee of Bar Examiners could reasonably conclude that the failure to answer such questions had obstructed inquiry into the applicant's qualifications, and it further found that the State's interest in securing this information outweighed any deterrent effect upon the freedom of speech and association guaranteed by the First Amendment. The reasoning of this Court in *Konigsberg* applies *a fortiori* to the present case. As stated by the New Jersey Supreme Court: "New Jersey's interest in preventing the gathering of firearms by groups dedicated to the forceful overthrow

of the Government or the forceful denial of constitutional rights appears to exceed by far the interest of the State advanced in *Konigsberg.*" (P27). Furthermore, the inquiry in question is not directed towards membership in any particular organization, such as the Communist Party (see *United States* v. *Brown,* 381 U. S. 537 (1965)), but is specifically keyed to the governmental interest involved by asking whether the applicant belongs or has belonged to an organization advocating commission of acts of force or violence designed to overthrow the Government or deny constitutional rights.

By contrast, most of the cases cited by the petitioner involved situations where persons were required to take *oaths* that they were not members of certain organizations or did not advocate or approve the overthrow of the Government, under threat alternatively of losing employment if they failed to take such oath, or running the risk of being convicted of perjury if the oath was taken falsely. See *e.g. Whitehill* v. *Elkins,* 389 U. S. 54 (1967); *Keyishian* v. *Board of Regents of the University of the State of New York,* 385 U. S. 589 (1967); *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966); *Baggett* v. *Bullitt,* 377 U. S. 360 (1964); *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961). The petitioner herein was placed in no such predicament. He could have answered the question affirmatively, negatively or qualifiedly, and there would have been no automatic adverse consequences from any answer.

The statutes overturned in several of the cases cited by petitioner penalized an individual for mere membership in an organization, without regard to character of his own activity in the organization. The Court theretofore found such laws to suffer from impermissible "overbreadth." See *e.g. United States* v. *Robel,* 389 U. S. 258 (1967); *Keyishian* v. *Board of Regents, supra; Elfbrandt*

v. *Russell, supra; Aptheker* v. *Secretary of State,* 378 U. S. 500 (1964). No such consequence results from an affirmative reply to the inquiry required by Chapter 60; the issuing authority must in every instance make inquiry into the nature of the individual applicant's activity in the organization mentioned.

Certain of the cases cited by petitioner also involved statutes which were impermissibly vague. See *e.g. Keyishian* v. *Board of Regents, supra; Cramp* v. *Board of Public Instruction, supra.* Thus, in *Cramp* the statute referred to lending aid, support, advice, counsel or influence to the Communist Party. Commenting upon this language, the Court said:

> "The provision of the oath here in question, it is to be noted, says nothing of advocacy of violent overthrow of state or federal government. It says nothing of membership or affiliation with the Communist Party, past or present. The provision is completely lacking in these or any other terms susceptible of objective measurement." 368 U. S. at 286.

By contrast, N.J.S. 2A:151-35 does refer to advocacy of violent overthrow of Government and does refer to membership, and thus is not lacking in terms susceptible of objective measurement.

The remaining First Amendment cases cited by petitioner involved open-ended inquiries into an individual's organizational ties, the scope of the inquiry thus offending the First Amendment by going beyond the information needed to meet any legitimate governmental interest. See *Shelton* v. *Tucker,* 364 U. S. 479 (1960); *Schneider* v. *Smith,* 390 U. S. 17 (1968). Here the inquiry is carefully limited to the governmental interest involved; an indi-

vidual who desires to buy and carry a gun is asked to state whether he belongs to an organization advocating use of force or violence to overthrow our Government or deny others constitutional rights.

The Supreme Court of New Jersey thus correctly concluded that New Jersey's interest in keeping firearms out of the hands of the dangerous and unfit clearly outweighs any minimal effect upon free association occasioned by the inquiry in question. Hence, petitioner has not made an adequate showing why this Court should afford an additional review of his constitutional claim.

POINT II

The Court does not have jurisdiction to consider the constitutionality of N.J.S. 2A:151-33, because the validity of that section was not raised or passed upon in the State courts.

The petitioner asks the Court to consider whether the provision in N.J.S. 2A:151-33(d) prohibiting issuance of an identification card to "any person where the issuance would not be in the interest of the public health, safety or welfare" violates the due process clause of the Fourteenth Amendment because it allegedly provides no standards or procedure for determining whether to grant an application. See *Burton* v. *Sills, supra,* 53 N. J. at 90-92. An examination of the briefs filed in the State courts discloses that this issue is now being raised for the first time. In fact, the petitioner did not even cite N.J.S. 2A:151-33 (d) in his brief submitted to the Supreme Court of New Jersey.

This failure precludes the petitioner from now asking the Court to consider the issue:

> "It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In *Crowell* v. *Randell,* 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with *Owings* v. *Norwood's Lessee,* 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the record, the appellate jurisdiction fails.' 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the *Crowell* opinion, *Miller* v. *Nicholls,* 4 Wheat 311, 315 (1819) and since." *Cardinale* v. *Louisiana,* 22 L. Ed. 2d 398, 400 (1969).

In addition, perhaps because he now raises the issue for the first time, petitioner seriously misconceives the thrust of N.J.S. 2A:151-33(d). The cases he cites generally relate to licenses required as a precondition to the exercise of First Amendment freedoms (*Shuttlesworth* v. *City of Birmington,* 89 S. Ct. 935 (1969)), or other prior restraints upon the exercise of First Amendment rights (*Lamont* v. *Postmaster General,* 381 U. S. 301 (1965); *Freedman* v. *Maryland,* 380 U. S. 51 (1965)). A firearms purchaser identification card, on the other hand, does not have to be obtained as a precondition to the exercise of First Amendment freedoms; it is simply a reasonable restraint on the acquisition of firearms. See *Burton* v. *Sills, supra,* 53 N. J. at 104-105. Furthermore, we again note that the issuing official at all times has the affirmative burden of determining whether the applicant is indi-

vidually qualified or disqualified under the terms of N.J.S. 2A:151-33 (P24), thus distinguishing the situation here from one where an applicant for a governmental benefit bears the burden of establishing that his exercise of First Amendment rights, including speech, have not been unlawful. See *Speiser* v. *Randell,* 357 U. S. 513 (1958).

The petitioner also assumes, without support in the record, that the mere failure to answer the questions concerning organizational membership automatically disqualifies an applicant from obtaining a purchaser identification card. However, this is not a case where an applicant has declined to answer certain questions and then requested a hearing to explain some special reason for declining. Throughout this litigation, petitioner has urged an absolute constitutional privilege under the First Amendment to refuse to answer the question concerning his organizational membership. It is now suggested for the first time that he might wish to present some other explanation of his action. Accepted principles of constitutional adjudication preclude petitioner from shifting his theory of the case in this fashion. *Cardinale* v. *Louisiana, supra.* In any event, we observe that the affirmance by the Supreme Court of New Jersey was without prejudice to the filing of a new application, so petitioner will be afforded another opportunity to present any pertinent evidence to the issuing authority or county court. At that time the New Jersey courts would have an opportunity, if petitioner raised the point, to consider whether there may be circumstances in which certain of the requirements of N.J.S. 2A:151-35 would be inapplicable.

However, the petitioner failed throughout the litigation in the state courts to raise the issues presented under Point III of his Petition for Writ of *Certiorari,* so the Court does not now have jurisdiction to consider it.

CONCLUSION

Since the decision of the Supreme Court of New Jersey is in accord with both the applicable decisions of this Court and the United States Constitution, respondent respectfully submits that the within petition for writ of certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
SEP 25 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 134

In the Matter of the Application

—of—

WALTER MARVIN, JR.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner's reply brief is addressed only to respondent's assertion that petitioner's Question No. 3 is not properly before this Court.

In its brief in opposition, respondent merged into a single question the first two questions presented in the petition for a writ of certiorari. In fact, the first question raising the First Amendment issue is closely wedded to the second question raising a claim of overbreadth-vagueness. The First Amendment defect in New Jersey's gun control law results from the state's failure to demonstrate that it cannot pursue its substantial interest in firearms control by means less restrictive of free speech and association rights. The First Amendment defect, therefore, sounds in overbreadth. However, as the second question demonstrates, there is another facet to the overbreadth aspect of this case. The New Jersey law encroaches on First Amendment rights that are beyond reach of the state, despite a showing of substantial state interest, cf. *Brandenburg* v.

Ohio, 395 U.S. 444 (1969). But it is not clear how far the statute in fact reaches. Hence this second defect of overbreadth merges with a due process defect of vagueness. Consequently, questions one and two are separately presented in the petition to make it clear that both First Amendment and Due Process claims are raised.

The respondent does not contend in its brief in opposition that petitioner neglected to raise or that the courts below failed to pass upon the argument that New Jersey's requirement is unduly vague or unclear in violation of the Fourteenth Amendment's Due Process Clause. Thus, the issue of vagueness is properly before the Court. Respondent seems to argue, however, that only that due process issue was properly raised below. Petitioner respectfully disagrees. The third question stated in the petition is but a variant of the vagueness issue, one which is comparatively unrelated to the overbreadth-First Amendment issue. However, it raises an issue clearly contemplated by the vagueness doctrine and is therefore properly before the Court.

Mr. Justice Brennan's concurring opinion in *United States* v. *Robel,* 389 U.S. 258 (1967), provides one of the most recent full dress analyses of the vagueness doctrine, as distinct from the components of the overbreadth doctrine. His analysis matches the majority's position in *Shuttlesworth* v. *City of Birmingham,* 89 S.Ct. 935 (1969), and demonstrates that when an allegation of vagueness is made, it is taken to include the elements raised in petitioner's second and third questions. As Justice Brennan described it, a vague statute has one or a combination of three deficiencies. "First. . . . [a] failure to provide adequate standards [which] reflects Congress' failure to have made a 'legislative judgment.'" *Id.* at 275. "Second. . . . [A failure to] take steps to assure, 'respect for con-

stitutional liberties' by preventing the existence of 'a wide gulf between the responsibility for the use of . . . power and the actual exercise of that power.' Procedural protections to avoid that gulf have been recognized as essential when fundamental freedoms are regulated." *Id.* at 277-78. "Third. The indefiniteness of the delegation also results in inadequate notice to affected persons." *Id.* at 281. See also *Interstate Circuit* v. *City of Dallas*, 390 U.S. 676, 684-685 (1968).

Petitioner respectfully submits that throughout these proceedings he has contested the constitutionality of the New Jersey law on the ground it is unclear and "void for vagueness." Question 3 in his petition, therefore, is "fairly comprised" in an issue that was properly raised and passed upon below. Rule 23(1)(c), Rules of the Supreme Court.

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